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No. 91-2059

In the Supreme Court of the United States

OCTOBER TERM, 1992

CEDARMINN BUILDING LIMITED PARTNERSHIP, ET AL.,
PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR
MIDWEST ASSOCIATION, F.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 1821(e) of Title 12 authorizes the "conservator or receiver appointed" for any insured depository institution to repudiate any lease "within a reasonable period following such appointment." The Resolution Trust Corporation (RTC) has interpreted Section 1821(e) to permit it to repudiate a lease within a reasonable period after it has been appointed the receiver of an institution, including in cases where the RTC has previously served as conservator of the same institution. The question presented is whether the RTC's interpretation reflects a permissible construction of Section 1821(e) under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MIDWEST ASSOCIATION, F.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-25a) is reported at 956 F.2d 1446. The March 4, 1991, memorandum and order of the district court (Pet. App. 26a-60a), the April 25, 1991, order of the district court (Pet. App. 61a-67a), and the May 22, 1991, memorandum and order of the district court (Pet. App. 68a-98a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1992. A petition for rehearing was denied on March 27, 1992. Pet. App. 1a. The petition for a writ of certiorari was filed on June 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985 and 1986, Midwest Federal Savings and Loan Association (Midwest Federal) sold 19 of its branch offices to petitioners, a group of investment partnerships, and then leased them back.[1] Midwest Federal devised these sale/leaseback transactions as "a short-term solution to keep federal regulators at bay." Pet. App. 7a. Indeed, Midwest Federal reported significant income in the years that the sales were recognized, because it sold the branch offices at prices well above their market value. See *ibid*; see also *id.* at 28a.

The sale/leaseback transactions were nonetheless quite costly for Midwest Federal over the long haul. For one thing, the entire risk of the transactions fell on Midwest Federal. Midwest Federal wholly financed the sale by lending Cedarminn 100% of the purchase price on a non-recourse basis. Midwest Federal also obtained two letters of credit in favor of Cedarminn, totalling $11.8 million, to pay damages in the event Midwest Federal defaulted on its lease obligations. In addition, Midwest Federal agreed to rent the branch

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[1] Petitioners are Cedarminn Building Limited Partnership, Minncedar Land Limited Partnership, Rockminn Leasing Corporation, and Midunited Building Company. Hereafter we will refer to them collectively as "Cedarminn."

offices from Cedarminn at a rate five times greater than the market rate. Pet. App. 7a, 28a-29a.

In February 1989, the Federal Home Loan Bank Board (the Bank Board) declared Midwest Federal insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator. In May 1989, the Bank Board appointed FSLIC as receiver of Midwest Federal for the purpose of liquidating the institution. To carry out the liquidation of Midwest Federal, the Bank Board created a new institution, Midwest Savings Association (Midwest Savings), and appointed FSLIC its conservator. Midwest Federal and Midwest Savings then entered into a purchase and assumption agreement, under which the majority of Midwest Federal's assets were transferred to Midwest Savings, in return for which Midwest Savings assumed certain liabilities of Midwest Federal.[2] As a result of this "pass-through receivership," FSLIC acquired the branch-office leases in its capacity as conservator of Midwest Savings. Pet. App. 29a.

When the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) was enacted on August 9, 1989, the Resolution Trust Corporation (RTC) statutorily succeeded FSLIC as conservator of Midwest Savings. Pet. App. 8a. FIRREA gave the conservator or receiver appointed for any insured institution the right to "repudiate any contract or lease," 12 U.S.C. 1821(e)(1) (Supp. II 1990), "within a reasonable period following such appoint-

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[2] Midwest Savings did not, however, assume any of Midwest Federal's subordinated debt or equity liabilities or obligations. As a result, FSLIC, as receiver for Midwest Federal, retained Midwest Federal's obligations with respect to the subordinated debt and the equity.

ment," 12 U.S.C. 1821(e)(2) (Supp. II 1990).[3] As the conservator of Midwest Savings, RTC decided that for two reasons it would not be in the institution's best interest to repudiate the branch-office leases at that point. First, RTC needed the offices to carry on the business. Second, RTC estimated that repudiation could cause Midwest Savings to lose as much as a third of its deposits and half of its customers. C.A. App. 566, 2035, 2752.

The inflated rent payments required under the leases nevertheless posed a serious obstacle to the sale of Midwest Savings as a going concern. Accordingly, RTC as conservator of Midwest Savings attempted between February 1989 and October 1990 to negotiate a modification of the leases with Cedarminn. During the negotiations, RTC as conservator occupied the leased premises, made all required lease payments,

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[3] 12 U.S.C. 1821(e)(1) (Supp. II 1990) provides:

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease—
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. 1821(e)(2) (Supp. II 1990) provides in pertinent part:

> The conservator or receiver appointed for any insured depository institution * * * shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

and retained the employees of Midwest Federal. Despite RTC's efforts, the negotiations to modify the leases ultimately proved fruitless. C.A. App. 2034, 2037, 2752.

Meanwhile, in May and June of 1990, RTC attempted to sell Midwest Savings as a whole, including the branches subject to the unmodified leases with Cedarminn. After receiving no acceptable bids for the institution as a whole, the institution was marketed in pieces. That approach produced acceptable bids for some assets and for the deposits in the branches subject to the leases with Cedarminn. C.A. App. 566, 2047, 2757.

On October 5, 1990, the Office of Thrift Supervision (OTS), statutory successor to the Bank Board, appointed RTC receiver for Midwest Savings to liquidate the institution. Upon its appointment as receiver, RTC transferred the insured deposits from the branches and sold the assets for which bids had been received. On October 29, 1990, RTC notified Cedarminn that it was repudiating the branch-office leases as of February 28, 1991. Along with the repudiation notice, the RTC tendered the rental payments due through February of 1991, as required by 12 U.S.C. 1821(e)(4) (Supp. II 1990). Pet. App. 8a, 9a & n.4.

2. RTC then brought an action against Cedarminn in the United States District Court for the District of Minnesota, seeking a declaratory judgment that its repudiation of the branch-office leases was timely and that Cedarminn had no right to draw against the letters of credit. Cedarminn filed a separate action, later consolidated with RTC's on appeal, seeking damages and a declaration that it could draw on the letters of credit. On cross-motions for summary

judgment, the district court held that RTC's repudiation was untimely, but that Cedarminn was not entitled to draw on the letters of credit. Pet. App. 8a.

The court's analysis of the repudiation issue focused on 12 U.S.C. 1821(e)(2) (Supp. II 1990), which requires "[t]he conservator or receiver appointed for any insured depository institution" to "determine whether or not to exercise the rights of repudiation * * * within a reasonable period following such appointment." RTC argued that in this case the "reasonable period" specified in Section 1821(e)(2) started on the date that RTC was appointed receiver of Midwest Savings—*i.e.*, October 5, 1990. Cedarminn argued, on the other hand, that the "reasonable period" started, at the latest, on August 9, 1989, the date that the RTC became conservator of Midwest Savings by operation of FIRREA. The court adopted Cedarminn's interpretation, stating "it appears that FIRREA requires the RTC to make the hard decision whether or not to repudiate before the decision is made to liquidate, *i.e.*, upon appointment of [RTC as] either a conservator *or* [as] a receiver." Pet. App. 44a. Based on that interpretation, the court determined that the 14-month period between August of 1989—when RTC became conservator of Midwest Savings—and October of 1990—when RTC, as receiver of Midwest Savings, repudiated the branch-office leases—was unreasonable, and that the repudiation was therefore invalid. *Id.* at 56a.

The court nonetheless rejected Cedarminn's argument that RTC's attempt to repudiate the leases "in and of itself, constitute[d] a default entitling Cedarminn to the proceeds of the letter of credit." Pet. App. 53a. Instead, the court held that "[i]f RTC

continues to make lease payments under the lease[s], Cedarminn can claim no default or entitlement to damages under the letter of credit." *Ibid.* The court enjoined Cedarminn from drawing on the letters of credit "so long as RTC continues to make all required lease payments * * * and is not in default." *Id.* at 57a.[4]

3. The court of appeals reversed. Pet. App. 2a-25a. It concluded that, under Section 1821(e), RTC had the right to repudiate the leases within a reasonable period after it was appointed receiver of Midwest Savings, even though it had not repudiated the leases while serving as conservator of that institution.

In arriving at that conclusion, the court first determined that the "plain language of FIRREA [12 U.S.C. 1821(e)] grants independent rights of repudiation to RTC in both its capacity as conservator and as receiver of an institution." Pet. App. 10a. The court observed that "[n]owhere in the language of the statute is it stated or implied that the appointment of RTC as a conservator negates powers RTC would enjoy if it were later appointed a receiver of the same institution." *Id.* at 11a. The court also reasoned that "[h]ad Congress intended RTC's status as a conservator or a receiver to be mere artifice, it would have granted all duties, rights, and powers to the Corporation." *Ibid.*

The court then turned to the question whether, "in situations where the receiver follows a conservator,"

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[4] Subsequently, Cedarminn did draw on the letters of credit. The Federal Home Loan Bank, which had issued the letters, honored the draw and foreclosed on the collateral for the letters. By orders dated April 25 and May 22, 1991, the district court enjoined Cedarminn from disposing of the proceeds. Pet. App. 68a-98a.

"Congress' mandate to make the repudiation determination within a reasonable period contemplate[d] only a single time frame" that commenced upon the appointment of a conservator, or an additional, "independent repudiation time frame" that commenced upon the appointment of the receiver. Pet. App. 12a. The court determined that with respect to that question the language of Section 1821(e) was "less than crystalline." *Id.* at 14a. The court observed, however, that "RTC has formally interpreted § 1821(e)" as allowing "both the conservator and the receiver to have an independent 'reasonable period' in which to repudiate." *Ibid.* The court held that that interpretation was "clearly a permissible construction" of Section 1821(e) under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), Pet. App. 25a, and in fact reflected "the most reasonable interpretation" of that provision, Pet. App. 23a.

The court cited six reasons for that conclusion. First, throughout FIRREA Congress was careful to specify those powers that the RTC "could pursue only in its capacity as receiver, or only in its capacity as conservator, but not both." Pet. App. 16a. In light of those instances, other instances, such as in Section 1821(e), in which Congress authorized RTC to exercise a power as "a conservator or a receiver" indicated an intent to allow the power "to be enjoyed or exercised by both the conservator and the receiver." Pet. App. 16a. Second, Congress's use of the disjunctive term "or" in Section 1821(e) further evidenced congressional intent "to grant RTC an independent right of repudiation in both its capacity as conservator and receiver." Pet. App. 17a (citing *Reiter* v. *Sonotone*

Corp., 442 U.S. 330, 339 (1979)). Third, the legislative history of FIRREA "emphasize[d] that the powers granted RTC * * * parallel the powers granted conservators or receivers under the former law," which recognized that conservators and receivers had independent rights to repudiate contracts and leases. Pet. App. 17a-18a. Fourth, RTC's interpretation accorded with FIRREA provisions that made clear that conservators and receivers "have different missions." *Id.* at 19a. Fifth, when FIRREA was enacted, it "ha[d] long been recognized that conservators of failed institutions are often replaced by receivers." *Id.* at 21a. Finally, RTC's interpretation accorded with Congress's intent to "grant[] broad power to the Corporation," as well as Congress's specific intention that RTC "look closely at sale-leaseback transactions such as those at issue here." *Id.* at 22a.

Having concluded that "RTC retained a new power to repudiate leases when it was appointed receiver in October 1990," Pet. App. 23a, the court held that "RTC's repudiation within twenty-four days of its appointment as receiver was reasonable," *id.* at 24a. The court also held that, since "FIRREA ha[d] been fully complied with," Cedarminn's damages were "limited to those prescribed under 12 [U.S.C.] § 1821 (e)(4)." *Id.* at 25a.

ARGUMENT

The court of appeals properly reviewed RTC's interpretation of 12 U.S.C. 1821(e) under *Chevron*, *supra*, and correctly concluded that it reflected a permissible construction of the statute. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners assert (Pet. 11) that the questions presented here are "at the heart of the nation's savings and loan crisis." Petitioners' own submission demonstrates the error of that assertion. As petitioners observe (*id.* at 12), since its inception in 1989 RTC has served as a conservator or receiver of hundreds of failed thrifts and handled billions of dollars in assets. Yet the provision at issue here, 12 U.S.C. 1821(e)(2), has been the subject of only four other district court decisions.[5] Moreover, as discussed below, none of those decisions warranted a different result here. Thus, petitioners' invocation of the "savings and loan crisis" (Pet. 11) does not justify further review of the question presented here in the absence of any conflict among the circuits on that question. In any event, the court of appeals decided that question correctly.

2. The court of appeals held that, under 12 U.S.C. 1821(e)(2), RTC may repudiate a lease within a reasonable period after it has been appointed receiver

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[5] See *Hunt* v. *RTC*, No. CV-92-1560-JMI (C.D. Cal. July 13, 1992); *RTC* v. *United Trust Fund, Inc.*, 775 F. Supp. 1465 (S.D. Fla. 1991), appeal pending, No. 91-5922 (11th Cir.); *701 NPB Associates* v. *FDIC*, 779 F. Supp. 1336 (S.D. Fla. 1991); and *Monument Square Associates, Inc.* v. *RTC*, 792 F. Supp. 874 (D. Mass. 1991).

of an institution, even when RTC previously served as conservator of the institution and did not repudiate the lease. Petitioners challenge that holding on several grounds, none of which has merit.

a. Petitioners first contend (Pet. 14) that the court of appeals "ignore[d] the plain language of the statute." The pertinent language of Section 1821(e)(2) is as follows:

> The conservator or receiver appointed for any insured depository institution * * * shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

As the court of appeals noted, the use of the disjunctive term "or" indicates that the terms separated by the "or" should be given independent effect. Pet. App. 17a. RTC's interpretation does so. Under RTC's interpretation, the conservator and the receiver each has an independent power under Section 1821(e)(1) to repudiate a lease, and under Section 1821(e)(2) each may exercise that power within a reasonable period after being appointed. RTC's reading reflects, at a minimum, a reasonable construction of the language.

Petitioners' interpretation, in contrast, is not faithful to the language of the statute. Under petitioners' reading, a receiver has no power to repudiate a lease in certain cases: namely, in cases where a conversator has previously been appointed and has determined not to repudiate the lease. See Pet. 15. But the plain language of Section 1821(e)(1) grants the receiver an independent right to repudiate a lease in *all* cases, including those in which the conservator has previously decided not to repudiate the lease.

Nothing in Section 1821(e)(2) restricts the right granted to the receiver in Section 1821(e)(1). As the court of appeals observed, "[n]owhere in the statute is it stated or implied that the appointment of RTC as a conservator negates powers RTC would enjoy if it were later appointed a receiver of the same institution." Pet. App. 11a. Because petitioners' interpretation imposes a restriction on the repudiation power of a receiver that has no support in the language of the statute, the court of appeals correctly upheld RTC's interpretation as "the most reasonable" one. *Id.* at 23a.

b. Petitioners next contend (Pet. 15) that RTC should not have "the luxury" of waiting until after it has been appointed receiver to decide whether to repudiate a lease. They argue that RTC should be forced to make that decision once and for all as soon as it is appointed conservator.

As the court of appeals recognized, this argument ignores the "distinct missions of the conservator and receiver." Pet. App. 18a-19a. In its capacity as conservator of a failed thrift, the RTC must "carry on the business of the institution and preserve and conserve the assets and property of the institution." 12 U.S.C. 1821(d)(2)(D)(ii) (Supp. II 1990). As receiver, in contrast, RTC is empowered to liquidate the institution. 12 U.S.C. 1821(d)(2)(E) (Supp. II 1990).

In light of the differences between RTC's duties as a conservator and its duties as a receiver, RTC could reasonably decide not to repudiate a lease while it was serving as the conservator of an institution but decide otherwise after it was appointed receiver of the institution. As the court of appeals explained:

> A conservator needs an open door; a receiver does not. Therefore, the value of a specific lease

> could vary significantly depending on the mission of the occupying party at the particular time. The requirement that RTC make the repudiation decision once and for all shortly after its first appointment as conservator would put RTC in the untenable position of trying to operate the business as an ongoing concern with one hand, while at the same time calculating the lease repudiation issue as if it were shutting the business down.

Pet. App. 20a.[6]

c. Petitioners also contend (Pet. 16-17) that the court of appeals improperly ignored 12 U.S.C. 1821 (d)(14)(B) (Supp. II 1990). Section 1821(d)(14)(B) is a statute of limitations, however, not a sub-

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[6] Petitioners also assert (Pet. 16) that RTC could indefinitely postpone the repudiation decision by ignoring the statutory distinctions between its duties as conservator and receiver. That assertion is baseless insofar as it implies that RTC will disregard its statutory duties in future cases. See *United States Dep't of State* v. *Ray*, 112 S. Ct. 541, 550 (1991) (official conduct is accorded a presumption of regularity); accord *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926). Insofar as petitioners contend that RTC unduly delayed repudiating the leases in this case, that fact-bound contention does not warrant further review. Although the court of appeals found it unnecessary to decide whether the fourteen-month period between RTC's appointment as conservator of Midwest Savings and its repudiation of the leases in its capacity as receiver was "unreasonable," the court noted that "since Cedarminn could show no prejudice by RTC's continued attempts to renegotiate the leases prior to the placement of Midwest Savings in receivership, RTC's repudiation could have been reasonable regardless of whether it had been appointed receiver of the institution and given an independent opportunity to repudiate the leases." Pet. App. 24a (footnote omitted).

stantive provision, and it was not at issue in this case.[7] Accordingly, there is no reason to believe that the court of appeals' interpretation of Section 1821 (e) (2) would necessarily lead it to adopt what petitioners consider an irrational interpretation of a different provision.

d. Petitioners criticize (Pet. 17) the court of appeals for discussing pre-FIRREA cases concerning the powers of conservators and receivers. That criticism is misguided. As the court of appeals explained, the legislative history of FIRREA indicated that Congress intended to grant to RTC powers that were "parallel" to those granted conservators and receivers under former law. Pet. App. 18a. Moreover, quite apart from such indicia of congressional intent, it was reasonable for the court to presume that Congress was aware of the traditional powers of conservators and receivers, and intended to confer those powers on RTC by directing it to act, in various contexts, as "conservator" or "receiver." See, e.g., *American National Red Cross* v. *S.G.*, 112 S. Ct. 2465, 2469 (1992). Thus, the court of appeals was properly guided by the case law extant when FIRREA was enacted.

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[7] 12 U.S.C. 1821 (d) (14) (A) (Supp. II 1990) generally prescribes, for "any action brought by the Corporation as conservator or receiver," a 6-year limitations period for contract claims and a 3-year period for tort claims. 12 U.S.C. 1821 (d) (14) (B) (Supp. II 1990) then provides:

> For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of—
>
> (i) the date of the appointment of the Corporation as conservator or receiver; or
>
> (ii) the date on which the cause of action accrues.

e. Finally, petitioners cite three district court cases in support of their argument that the plain language of Section 1821(e)(2) permits only a single repudiation period. *Rechler Partnership* v. *RTC*, No. 90-3091 (D.N.J. Sept. 4, 1990); *RTC* v. *United Trust Fund, Inc.*, 775 F. Supp. 1465 (S.D. Fla. 1991), appeal pending, No. 91-5922 (11th Cir.); *701 NPB Associates* v. *FDIC*, 779 F. Supp. 1336 (S.D. Fla. 1991). Their reliance on these decisions is misplaced. *Rechler* is inapposite because it did not address whether a receiver appointed to replace a conservator has an independent repudiation period. Rather, *Rechler* concerned whether, under the facts of that case, RTC as receiver of a failed thrift had repudiated a lease within a reasonable period.

Although *United Trust Fund* did address the question presented here, the court of appeals in the present case correctly declined to follow that decision. As the court of appeals recognized (Pet. App. 19a-21a), the conclusion in *United Trust Fund* that Section 1821(e)(2) grants RTC only a single "reasonable period" to repudiate a lease rested on the erroneous premise that there is no meaningful distinction between the roles of conservators and receivers. See 775 F. Supp. at 1468-1469. *701 NPB* provides no guidance here for the same reason; the court in *701 NPB* failed to consider the statutory distinctions between RTC's duties as conservator and its duties as receiver.

Moreover, neither *United Trust Fund* nor *701 NPB* analyzed the question presented here in any depth. The court in *United Trust Fund* devoted only one paragraph to the issue and cited only one decision —the district court's decision in the present case—to support its holding. 775 F. Supp. at 1468. Similarly,

the court in *701 NPB* disposed of the issue in a single paragraph and cited only *United Trust Fund*. See *701 NPB*, 779 F. Supp. at 1339. The bobtailed analyses in these decisions stand in sharp contrast to the lengthy and careful analysis of the court of appeals below. See Pet. 10a-23a.

3. Having determined that the language of Section 1821(e) was "less than crystalline" with respect to the question presented here, the court of appeals properly reviewed RTC's interpretation of that provision under *Chevron*, *supra*. In contending (Pet. 17-21) that RTC's interpretation was not entitled to deference, petitioners rely principally on this Court's decision in *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). Petitioners' reliance on that decision is misplaced.

In *Bowen* v. *Georgetown Univ. Hosp.*, this Court refused to accord deference to the Secretary of Health and Human Service's interpretation of a regulation because the interpretation was developed "only in the context" of that litigation and was "wholly unsupported by regulations, rulings, or administrative practice." 488 U.S. at 212. The Court accordingly followed its prior decisions "declin[ing] to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question." *Ibid.* The Court also observed that the interpretation advanced by the Secretary in that case was contrary to the interpretation he had advanced in prior cases. *Id.* at 212-213.

The present case does not involve an agency interpretation freshly minted for the instant litigation. On the contrary, RTC has always interpreted Section 1821(e) to permit it to repudiate a lease within a reasonable period after it has been appointed receiver of an insured institution, including in cases where

it has previously served as conservator of the institution. That interpretation is reflected not just in prior litigation but also in prior administrative practice, as shown by the facts of the present case and others in which RTC has repudiated a lease following its appointment as receiver for an institution that it has previously served as conservator. In this case, as was true in *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1179 (1991), because the agency has definitively interpreted a statute in the course of administering that statute, its interpretation "*is* agency action, not a *post hoc* rationalization of it." Thus, RTC's interpretation is not merely a "convenient litigating position," but instead reflects consistent "administrative practice"; this Court's decision in *Bowen* v. *Georgetown Univ. Hosp.* is therefore inapposite. See 488 U.S. at 213.

Petitioners criticize the policy statement in which RTC has set forth its interpretation of Section 1821 (e) as insufficiently formal to warrant deference. See Pet. App. 105a-109a. That criticism is misguided. This Court made clear in *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986), that a reviewing court may accord *Chevron* deference to an agency's interpretation of a statute, even if that interpretation "has not been reduced to a specific regulation," so long as the interpretation is manifested by the agency's consistent "practice and belief." Petitioners do not dispute that as a matter of agency practice RTC has consistently adhered to the interpretation of Section 1821(e) advanced here. That interpretation is therefore entitled to "considerable weight." *Philadelphia Gear*, 476 U.S. at 439 (quoting *Chevron*, 467 U.S. at 844); see also *Martin*, 111 S. Ct.

at 1179; *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980).[8]

4. The court of appeals correctly determined that Cedarminn's damages are limited to those prescribed in Section 1821(e)(4). Pet. App. 25a.[9] Petitioners nonetheless assert (Pet. 22) that the court of appeals should have addressed whether Sections 1821(e)(11) or (13) permitted them to retain the proceeds of the

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[8] Petitioners do not contend that, in issuing the policy statement, RTC either exceeded its authority under 12 U.S.C. 1441a(b)(12)(A) (Supp. II 1990) to "issue such rules, regulations, standards, policies, procedures, guidelines, and statements as [RTC] considers necessary or appropriate to carry out [its responsibilities]," or violated the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* Instead, they complain about the absence of record evidence concerning the circumstances under which the policy statement was issued. Pet. 18-19. The policy statement was indisputably issued by RTC, 55 Fed. Reg. 14,368 (1990), and expressly addresses the repudiation powers granted by Section 1821(e). In any event, no evidence on this issue was presented in the district court because petitioners did not, at that stage, dispute that RTC had adopted the interpretation of Section 1821(e) that is at issue here; instead, the dispute in the district court centered on the validity of RTC's interpretation. Petitioners' further complaint (Pet. 18) that the policy statement was not reviewed by the RTC Oversight Board provides no reason for discounting the policy statement. Although RTC policies are indeed subject to review by the Board, nothing in 12 U.S.C. 1441a(b)(12)(B) (Supp. II 1990) requires Board approval before a policy statement may take effect.

[9] 12 U.S.C. 1821(e)(4) (Supp. II 1990) generally provides that "[i]f the conservator or receiver disaffirms or repudiates a lease under which the insured depository institution was the lessee, the conservator or receiver shall not be liable for any damages" other than contractual rent accruing through the effective date of the repudiation.

letters of credit. Neither provision, however, is implicated in this case.[10]

Section 1821(e)(13) protects extensions of credit by the Federal Home Loan Banks (FHLBs) to insured institutions, as well as certain security interests held by FHLBs, from the receiver's repudiation powers. That provision does not apply here. RTC as receiver did not repudiate the letters of credit issued by the FHLB, nor did it avoid any security interest held by the FHLB. To the contrary, the FHLB's security interest was fully satisfied.[11] Consequently, the court of appeals was not required to construe Section 1821(e)(13).[12]

Section 1821(e)(11)—which prohibits the RTC from using its repudiation powers to "avoid[]" any "legally enforceable or perfected security interest" in the assets of an insured institution—is also inapplicable on this record. Although petitioners now claim a "property interest" in the letters of credit and "Collaterally Assigned Mortgages" (Pet. 23), petitioners

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[10] Assuming *arguendo* that the court of appeals should have considered the applicability of Sections 1821(e)(11) and 1821(e)(13), the matter would appropriately be considered by the district court on remand rather than by this Court in the first instance. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

[11] Cedarminn drew on the letters of credit. The FHLB honored the draw, performed on the letters of credit, and converted the collateral supporting the letters ($11.8 million in cash supplied by the receiver of Midwest Savings) to its own account. See Pet. App. 65a.

[12] Indeed, the FHLB withdrew from the case in the district court with Cedarminn's consent and took no part in the appeal.

have not shown that they have any "legally enforceable or perfected security interest" in the assets of Midwest Federal or Midwest Savings. The only security interest connected with the letters of credit belonged not to petitioners, but to the FHLB and, as noted above, that security interest has been satisfied. The record did not evidence any legally enforceable or perfected security interest in the "Collaterally Assigned Mortgages." [13] The court of appeals therefore had no occasion to construe Section 1821(e)(11).[14]

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[13] Petitioners first alleged they had a security interest in the collaterally assigned mortgages in their reply brief in the court of appeals, where they cited portions of the leases with Midwest Federal calling for an assignment of mortgage collateral. No evidence was presented below, however, to show that those assignments were actually executed so as to create a "legally enforceable and perfected security interest." 12 U.S.C. 1821(e)(11).

[14] Moreover, even if Cedarminn's status as a beneficiary under the letters of credit could somehow be construed to grant it a security interest in the assets of Midwest Federal, that security interest has not been "avoided." To the extent that a valid claim against the security collateralizing a repudiated contract exists, Section 1821(e)(11) only requires that the receiver satisfy that secured claim to the extent of the collateral. Here, however, Cedarminn has no valid claim because Section 1821(e)(4)(B)(ii) precludes any claims under acceleration provisions in repudiated leases. Inasmuch as the claim underlying Cedarminn's demand for the proceeds of the letters of credit indisputably rests on such an acceleration clause, allowing Cedarminn to claim the proceeds pursuant to Section 1821(e)(11) would turn the statute on its head by allowing the amount of collateral to define the amount of the claim. Because the repudiation was proper, Cedarminn sustained no compensable damages under the lease agreements and could not have presented a proper draw on the letters of credit.

Assuming *arguendo* that Section 1821(e)(11) and (13) were implicated here, further review would nonetheless be unwarranted. Contrary to petitioners' assertion that there is "conflict and confusion among the district courts" concerning these provisions, Pet. 22, only two decisions, *First Nat'l Bank* v. *Unisys Fin. Corp.*, 779 F. Supp. 85 (N.D. Ill. 1991); *LB Credit Corp.* v. *RTC*, No. 91-C-4379 (ND. Ill. Aug. 10, 1992), have addressed the applicability of Section 1821(e)(11) in the present context. No district court has yet construed Section 1821(e)(13). Petitioners' reliance on *FDIC* v. *United States Trust Co.*, No. 92-10626-T (D. Mass. May 12, 1992), to establish a conflict is misplaced. In that case, the district court held that a court cannot enjoin a lessor from drawing on a letter of credit issued in connection with a repudiated lease. As we have explained, in the present case Cedarminn has already drawn on the letters of credit, and thus its right to do so is not at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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